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State of Utah v. james Allen Deal and Susan Anita Deal : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 900434-CA

STATE OF UTAH,	:	
Plaintiff and Appellee,	:	Case No. 900434-CA
vs.	:	
JAMES ALLEN DEAL and SUSAN ANITA DEAL	:	Priority No. 2
Defendants and Appellants.	:	

BRIEF OF APPELLANTS

APPEAL FROM THE FIFTH CIRCUIT COURT, STATE OF UTAH, WASHINGTON COUNTY, ST. GEORGE DEPARTMENT, THE HONORABLE ROBERT F. OWENS, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from the Circuit Court's adjudication that James A. Deal and Susan A. Deal possessed drug paraphernalia with intent to use the same in violation of Utah Code Ann. § 58-37a-5(1) (1981). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(d) (1990).

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

1. Did the trial court err in denying Defendants' Motion to Suppress Evidence when the warrant and affidavit were so lacking in indicia of probable cause that no reasonable officer could have relied upon them in good faith. The standard of review for denial of a motion to suppress evidence is whether the evidence taken as a whole provides a substantial basis for the finding of probable cause. *State v. Ayala*, 762 P.2d 1107, 1110 (Utah App. 1988); *see also State v. Droneburg*, 781 P.2d 1303, 1305 (Utah App. 1989).

2. Did the trial court err in denying Defendants' Motion to Disclose the Identity of the Confidential Informant when the confidential informant's identity

was essential for Defendants to effectively prepare their defense. The standard of review on appeal for this issue is a de novo review.

3. Was there sufficient evidence to support a finding that the Defendants were the "possessors" of the drug paraphernalia and that they intended to use the same. The standard of review for this issue on appeal is whether in viewing the evidence in the light most favorable to the verdict, the Court of Appeals finds that reasonable minds must have entertained a reasonable doubt that the Defendants committed the crime of which they were convicted. *See State v. Cantu*, 750 P.2d 591, 593 (Utah 1988).

STATEMENT OF THE CASE

On April 4, 1990, a warrant was issued to search the premises of Defendants James A. Deal and Susan A. Deal (Record[1] at 3). Shortly thereafter, police officers searched the Defendants' home and found drug paraphernalia and a plastic baggie containing a substance that field-tested positive for methamphetamines. (R. at 6-8). On April 5, 1990, the Fifth Judicial Circuit Court in and for Washington County issued a two-count Information, Count 1 listing the crime of Possession of a Controlled Substance with Intent to Distribute, a Second-degree Felony, and Count 2 listing the crime of Possession of Drug Paraphernalia, a Class B Misdemeanor. (R. at 1).

After receiving the lab report on the white substance in the plastic baggie found during the search, the State on its own motion moved to dismiss Count 1 of the Information, which motion was granted on May 3, 1990. (R. at 17, 18, and 24).

Because the affidavit did not indicate whether the confidential informant personally observed the alleged purchase of the methamphetamines at Defen-

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[1] Because the appeals of both Defendants were consolidated, Defendants refer only to the record of Defendant James A. Deal for the sake of convenience, unless otherwise indicated. The record is hereinafter referred to as "R."

dants' residence, Defendants moved the Court for an order disclosing the identity of the confidential informant, which order was denied on June 15, 1990. (R. at 51, 53). Defendants also moved the Court for an order suppressing the drug paraphernalia seized during the search of Defendants' residence on the ground that the affidavit and warrant lacked sufficient probable cause. This motion was denied on July 20, 1990. (R. at 59; R. at 66 p. 22, 23).

Defendants' trial was consolidated and held on July 20, 1990. (R. at 66). The trial court found Defendants guilty of Count 2 of the Information, Possession of Drug Paraphernalia. Defendants were fined $200.00, and were sentenced to ten days in jail, eight days being suspended. (R. at 59-62; Record of Susan Deal at 55-58). Defendants filed their appeal from the trial court's ruling on August 9, 1990. (R. at 63; Record of Susan Deal at 59).

STATEMENT OF FACTS

1. On April 4, 1990, Officer Wendy Weston prepared an affidavit and a search warrant to search Defendants' residence. (R. at 3, 4). In her affidavit, Officer Weston stated that she had prior connection with a certain confidential informant who had been reliably used on three previous occasions. (R. at 4, para. 6). According to Officer Weston, this confidential informant saw a 1/2 gram of crank (methamphetamine) that was purchased at the Defendants' residence. (R. at 4, para. 5).

2. Based on the statements in the affidavit of Officer Weston, Judge Richard Dobson issued a no-knock warrant to search Defendants' residence. (R. at 3). After the officers had searched the Defendants' home and during the trial in this matter, it was discovered that the confidential informant never observed the purchase of the methamphetamines at the Defendants' residence. In fact, the confidential informant merely accompanied a third party to the home of the Defendants, and

some time after leaving Defendants' home, the third party told the confidential informant that he purchased the methamphetamines at Defendants' residence. (R. at 66, p. 4, 5, 14, 15, 21-23). All these facts were known to Officer Weston at the time she prepared the warrant in question. (Record of Susan Deal at 62, p. 11-13). Officer Weston knew or should have known that she was relying on the hearsay of a third person with whom she had no prior dealings, and for whom no reliability or basis of knowledge was ever established.

3. Officer Weston utilized the warrant she obtained and actively participated in the search of Defendants' residence. (R. at 6, 7). During the search, a plastic bag with a white powdery substance was found and field-tested immediately as containing methamphetamines. (R. at 8). Yet, after the lab returned its report on the powdery substance, the State on its own motion requested the Court to dismiss Count 1 of the Information. (R. at 17, 18, and 24).

4. The officers conducting the search also found items identified as drug paraphernalia in a baseball cap hanging on the wall. (R. at 66, p. 35). The baseball cap was one of five or six hanging on little nails on the wall in what the State claims to be Defendants' bedroom. (R. at 66, p. 59, 60). Yet, aside from the fact that the officers found the cap containing the drug paraphernalia in what the State claims to be the Defendants' room, the State produced no evidence that the Defendants had possession or control of the baseball cap or the drug paraphernalia. (R. at 36). Further, no evidence was produced at trial indicating that other occupants of the home, such as Defendants' 17-year-old son, were excluded from entering the room in which the baseball cap was found. (R. at 66, p. 59, 60).

5. Finally, the officers did not take the baseball cap containing the drug paraphernalia into evidence. (R. at 66, p. 35).

SUMMARY OF THE ARGUMENT

Defendants argue that the warrant allowing search of Defendants' home was defective in that it did not set forth enough facts to allow a neutral magistrate to find probable cause for the search of Defendants' home. The State relied upon a confidential informant in preparing the affidavit though it knew that the confidential informant never observed the purchase of the methamphetamines at Defendants' residence, and though it knew that the confidential informant obtained her information from an unidentified third person. The State made no showing that it had used this third person reliably in the past or that it even had any association with this third person.

No other facts in the affidavit indicated the confidential informant's basis of knowledge. There were no admissions against interest, self-verifying detail, or any other facts suggesting that the confidential informant had reason to believe that the Defendants sold this unidentified third person crank. The only thing relied on by the confidential informant in making her allegations was the hearsay of the unidentified third person.

Further, the State failed to show that the confidential informant, herself, was reliable. The officer executing the warrant merely said that the confidential informant had been used reliably in the past on three previous occasions. No other information about these three previous occasions was listed in the affidavit, and nothing in the affidavit indicated how, when, or where this confidential informant had been previously used.

Defendants argue that Officer Weston was aware of the problems presented in the warrant by use of the unidentified third party, and accordingly, Officer Weston finessed the critical language in the warrant to read "that the confidential

informant did personally observe 1/2 gram of crank *which was purchased at Jim Deal's residence.*" (R. at 4, para. 5) (emphasis supplied).

Because of Officer Weston's involvement, and because of the clear deficiencies in the warrant, including a sufficient showing of reliability on the part of the confidential informant, the officers could not have in good faith relied upon the warrant or the affidavit in conducting the search. The evidence obtained pursuant to the warrant should, therefore, have been suppressed.

Defendants also argue that because the State relied upon this unidentified third person in making the statements set forth in the affidavit, disclosure of the confidential informant was critical to the Defendants' preparation for the suppression hearing. Defendants needed to show that the confidential informant relied upon the hearsay of an unidentified third party, and that the State did not in good faith rely upon the warrant in searching Defendants' residence. The trial court, therefore, erred in denying Defendants' motion to disclose the identity of the confidential informant.

Finally, Defendants argue that the evidence produced at trial was insufficient to show that either of them were in possession of the drug paraphernalia with intent to use the same. The baseball cap in which the drug paraphernalia was located was never taken into evidence. The baseball cap was hanging among five or six other baseball caps, and the State made no showing that other parties were excluded from the area in which the baseball cap was located. Moreover, the position of the baseball cap in relation to other objects in what the State claims to be the Defendants' room was never established. The area in which the baseball cap was located was a common area, not under the control of the Defendants, and the trial court erred in finding that the Defendants were in possession of the drug paraphernalia with intent to use the same.

ARGUMENT

POINT I

THE AFFIDAVIT IN SUPPORT OF THE WARRANT TO SEARCH DEFENDANTS' RESIDENCE IS SO LACKING IN PROBABLE CAUSE THAT THE OFFICERS COULD NOT HAVE RELIED UPON THE WARRANT IN GOOD FAITH WHEN EXECUTING THE WARRANT, AND THEREFORE, THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE OBTAINED PURSUANT TO THE WARRANT.

The Fourth Amendment requires that "no warrants shall issue, *but upon probable cause,* supported by oath or affirmation, and *particularly describing the place to be searched,* and the person or things to be seized." U.S. Const. amend. IV (emphasis supplied); *See also* Utah Const. art. I, § 14. The probable cause standard requires "the issuing magistrate to make a reasonable determination whether 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. Stromberg,* 783 P.2d 54, 56, 57 (Utah App. 1989).

On an appeal for failure to suppress evidence, "[t]he role of the reviewing court is not to conduct a 'de novo probable-cause determination,' but to determine 'whether the evidence viewed as a whole' provides a 'substantial basis' for the finding of probable cause." *State v. Ayala,* 762 P.2d 1107, 1110 (Utah App. 1988). Yet, "reviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" *State v. Droneburg,* 781 P.2d 1303, 1305 (Utah App. 1989) (quoting *United States v. Leon,* 468 U.S. 897, *reh,g denied* , 468 U.S. 1250 (1984). If an affidavit is so lacking in probable cause that it could not have been reasonably relied upon by the executing officers, evidence obtained pursuant to that warrant must be suppressed.

A. THE CONFIDENTIAL INFORMANT HAD NO PERSONAL KNOWLEDGE OF THE FACTS ALLEGED IN THE AFFIDAVIT, AND NO OTHER FACTS OR DETAIL IN THE AFFIDAVIT PROVIDED THE CONFIDENTIAL INFORMANT'S BASIS OF KNOWLEDGE.

In his concurring opinion to *Spinelli v. United States,* 393 U.S. 410 (1969), Justice White noted that there are two possible ways that an informant's basis of knowledge may be established so that a neutral magistrate may make the probable cause determination.

> If the affidavit rests on hearsay--an informant's report--what is necessary under *Aguilar* is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it--perhaps one of the usual grounds for crediting hearsay information. The first presents few problems: since the report, although hearsay, purports to be first-hand observation, remaining doubt centers on the honesty of the informant, and that worry is dissipated by the officer's previous experience with the informant. The other basis for accepting the informant's report is more complicated. But, if, for example, the informer's hearsay comes from one of the actors in the crime in the nature of admission against interest, the affidavit giving this information should be held sufficient.

Id. at 425. If the informant had personal knowledge of the facts contained in the affidavit, no inquiry into the self-verifying detail, admission against interest or other corroborating evidence is necessary.

Moreover, if more than one informant is relied upon to establish the facts in the affidavit, the personal knowledge of each informant must be set forth. As Wayne R. LaFave explained in his treatise on the Fourth Amendment,

> "It is not unusual for an affidavit of a law enforcement officer to contain hearsay information from an informant, which, in turn, is based on other information gathered by that informant," and thus the judicial officer "need not categorically reject this double hearsay information." *Rather, it must be determined if there is "sufficient information so that both levels of hearsay" may be properly relied upon.* Essentially the same approach is

> called for when there is a longer chain of hearsay, as where what informant A said to informant B was passed on to informant C who then told informant D who in turn told officer E. Assuming officer E is the affiant or is testifying upon a motion to suppress, his task is to show veracity and basis of knowledge "at each level." (Emphasis supplied, citations omitted).

1. W. LaFave, Search and Seizure, § 3.3(d) at 668 (1987).

The affidavit in question never set forth the personal knowledge of the confidential informant. It provided only that the informant "did personally observe 1/2 gram of crank *which was purchased at Jim Deal's residence.*" (R. at 4, para. 5) (emphasis supplied). From reading the affidavit, it is not clear whether the informant ever observed the crank being purchased at the Defendants' home. Indeed, at the suppression hearing, the State indicated that the confidential informant never entered into the Defendants' home and never observed the purchase of the crank. The confidential informant merely accompanied a third party to the Defendants' home, waited outside while the alleged purchase was made, and then some time afterward was informed by the third person that he purchased crank at the Defendants' home. (R. at 66, p. 4, 5, 14, 15, 21-23). No other evidence was produced at trial indicating that the informant knew that the third person obtained the crank from the Defendants' residence. Further, the facts involving the third person were never disclosed to the magistrate issuing the warrant though the officers were aware of those facts. Rather than disclosing those facts, the affiant, Officer Weston, phrased the critical sentence to read that the confidential informant "did personally observe the 1/2 gram of crank *which was purchased at Jim Deal's residence.*" (R. at 4, para. 5) (emphasis supplied). Clearly the officer did not conduct herself with complete candor. *See State v. Nielsen*, 727 P.2d 188, 190, 191 (Utah 1986). The simple fact is that the confidential informant had no personal knowledge of the facts alleged in the affidavit or any facts sufficient to support a finding of probable cause for the search of Defendants' residence.

Moreover, the affidavit sets forth no personal verification of the officer executing the warrant or any other information that supports the confidential informant's basis of knowledge. *Cf. State v. Bailey*, 675 P.2d 1203, 1204, 1206 (Utah 1984). The only self-verifying detail mentioned in the warrant is the Defendants' residence. Such detail is innocuous. *See State v. Jackson*, 688 P.2d 136, 140 (Wash. 1984). The detail listed in the present affidavit is even less substantial than that relied on by the officer in *Droneburg*, 781 P.2d at 1304. The confidential informant in this case simply had no personal knowledge of the facts alleged in the affidavit, and no other facts or detail in the affidavit provided the confidential informant's basis of knowledge.

B. THE STATE FAILED TO ESTABLISH THE CONFIDENTIAL INFORMANT'S VERACITY AND RELIABILITY.

The confidential informant's veracity and reliability may be established by his track record or any declaration against penal interest. *Jackson*, 688 P.2d at 140; 1 W. LaFave, § 3.3(b) and (c).

No facts in the affidavit even suggest that the confidential informant made any admissions against penal interest. Neither did the State claim any such admissions against penal interest. The only indication of the confidential informant's veracity in the entire affidavit is in paragraphs 6 and 7 of the affidavit. Paragraph 6 provides that the confidential informant has given accurate information on three previous occasions. In paragraph 7 of the affidavit, the officer suggests that the confidential informant is reliable because the officer received numerous reports from other confidential informants and citizens that the Defendants were dealing in crank. (R. at 4).

A mere recitation that the confidential informant was reliably used in the past is insufficient to establish the confidential informant's veracity and reliability.

> The "reliable information in the past" recital lacks any factual indication of how reliable the informer is. The magistrate is, in effect, relying upon the factual determination of the arresting officer that the informer is sufficiently reliable, and not upon his own independent judicial determination. *This does not square either with the Aguilar demand for "underlying circumstances" or with the requirement that the essential facts supporting the assertion of probable cause be made known to the reviewing magistrate.* Where reliability is important, the facts supporting reliability are as essential as any others to a showing of probable cause. With such facts, the magistrate can challenge the reasonableness of the officer's belief in his informer's reliability. *When the further possibility is considered that an officer has not made a good-faith assessment of the informer's reliability,* or may even know him to be unreliable, the dangers in acceptance of vague averments of reliability become even more obvious. Judicial acceptance may tempt officers to make superficial averments of reliability without proper support; and some officers, while they may be above wholesale fabrication, may not be averse to some stretching of the truth on occasion. (Emphasis supplied).

1 W. LaFave, § 3.3(b) at 636, 637; *see also State v. Bowen,* 538 P.2d 1336, 1337 (Colo. 1975); *State v. Woodall,* 666 P.2d 364, 366 (Wash. 1983). *See also* R. at 7 (the affiant was the officer who executed the search). Though the statement in paragraph 6 indicates how many times the confidential informant was used, it does not indicate when the confidential informant was last used or the circumstances surrounding her last use. *Droneburg,* 781 P.2d at 1306. The conclusory assertions of reliability in paragraph 6 are insufficient for any magistrate to determine the confidential informant's veracity and reliability.

Finally, the alleged tips from other confidential informants and citizens in paragraph 7 of the affidavit are fraught with the very same problems that the confidential informant's tip is faced with in paragraph 6 of the affidavit. There is simply no showing of "how, when or where the information was obtained." No

reasonable officer executing this warrant could have relied upon this warrant in good faith.

C. THOUGH RIGID ADHERENCE TO THE *AGUILAR SPINELLI* TEST IS NO LONGER REQUIRED, THE CONFIDENTIAL INFORMANT'S VERACITY AND BASIS OF KNOWLEDGE ARE STILL RELEVANT FACTORS IN DETERMINING PROBABLE CAUSE, AND A WARRANT LACKING SUFFICIENT FACTS TO SHOW BOTH THE CONFIDENTIAL INFORMANT'S VERACITY AND BASIS OF KNOWLEDGE CANNOT BE RELIED UPON BY THE EXECUTING OFFICER IN GOOD FAITH.

Though the United States Supreme Court rejected the rigid *Aguilar Spinelli* test in *Illinois v. Gates*, 462 U.S. 213 (1983), and though the Utah Supreme Court has similarly rejected the rigid *Aguilar Spinelli* test beginning with its decision in *State v. Anderton*, 668 P.2d 1285 (Utah 1983), a showing of the confidential informant's veracity and reliability is still relevant in the probable cause determination. *State v. Anderson*, 701 P.2d 1099, 1104 (Utah 1985) (Stewart J., dissenting); *see also Ayala*, 762 P.2d at 1109; *Stromberg*, 783 P.2d at 57. The affidavit "must contain specific facts sufficient to support a determination by a neutral magistrate that probable cause exists." *Droneburg*, 781 P.2d at 1304. If the magistrate merely ratifies the bare conclusions of others, he becomes a "rubber stamp" for the police. *Id.*

Defendants contend that the facts available to the magistrate in his probable cause determination were so lacking in any showing of the confidential informant's veracity and basis of knowledge that the magistrate could not have reasonably relied upon those facts in finding that probable cause for search of Defendants' residence existed. Moreover, no reasonable officer acting in good faith could have relied upon this warrant in executing the search. This is especially true since the officer executing the search was also the affiant and was aware that the confidential informant relied solely on hearsay in making her statements.

Moreover, the warrant was merely a form on the officer's computer, and it is clear from reading the warrant that not only are the facts insufficient for supplying the confidential informant's veracity and basis of knowledge, but that the warrant is overly broad. It allows search for marijuana, cocaine and other controlled substances, and the affidavit provides that these substances may be found on the Defendants' premises, vehicle, person, and container. (*See* R. at 4; R. at 66, p.11, 12, 15-18). Although forms on a computer are helpful, the officers using those forms must be responsible when filling them out. This warrant was simply overly broad. *See State v. Gallegos*, 712 P.2d 207, 209 (Utah 1985). This warrant simply did not allow the officers searching the Defendants' residence to conduct that search in good faith. The trial court, therefore, erred in failing to suppress the evidence obtained pursuant to the warrant.

POINT II

DISCLOSURE OF THE CONFIDENTIAL INFORMANT'S IDENTITY WAS ESSENTIAL TO A FAIR DETERMINATION OF THE ISSUES IN THIS CASE AND MATERIAL TO THE DEFENDANTS' DEFENSE; THE TRIAL COURT, THEREFORE, COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANTS' MOTION TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

In *State v. Forshee*, 611 P.2d 1222 (Utah 1980), the Utah Supreme Court discussed the privilege of nondisclosure of an informer's identity. The Court said:

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
>
> *The scope of the privilege is limited by its underlying purpose.* Thus, where a disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise,

> once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.
>
> A further limitation on the applicability of the privilege arises from the fundamental requirement of fairness. Where disclosure of an informer's identity, or of contents of his communication, *is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause, the privilege must give way.* (Emphasis supplied).

Id. at 1224 (quoting *Roviaro v. United States*, 353 U.S. 53 (1957)).

In the present case, disclosure of the informant's identity was necessary to a fair determination of this case and material to the Defendants' defense. A close reading of paragraph 5 of the affidavit reveals that the confidential informant never observed the 1/2 gram of crank being purchased at the Defendants' residence. It only states that she "did personally observe the 1/2 gram of crank *which was purchased at Jim Deal's residence.*" (R. at 4, para. 5) (emphasis supplied). Nothing in the affidavit or in the police report indicates that the confidential informant personally observed the purchase at Defendants' residence. (R. at 1-10). Neither does anything in the affidavit or police report indicate the circumstances surrounding the confidential informant's alleged personal observation of the purchase of the crank. (R. at 1-10; *see also Droneburg*, 781 P.2d at 1306). Given the fact that indeed the confidential informant never observed the purchase of the crank at the Defendants' residence, and given the fact that the confidential informant merely observed the crank in the hands of a third party who then told the confidential informant that he purchased the crank at the Defendants' residence, (*see* R. at 66, p. at 4, 5, 14, 15, 21-23), it was essential that the confidential informant's identity be disclosed so that the Defendants could establish that the confidential informant merely relied upon hearsay and casual rumor in making her assertions set forth in the affidavit and so that Defendants could establish that the

police did not act in good faith reliance on the warrant when conducting the search.

At the suppression hearing, Defendants had a right to establish that the confidential informant had no idea whether the third person, before entering the Defendants' home, was already in possession of crank. And if the confidential informant claimed that she did have such knowledge, Defendants had a right to ascertain how she came about that knowledge: whether she searched the third person before entering the Defendants' home, whether she merely relied upon the third person's assurances, or whether she learned of the third person's possession and purchase of the crank through yet another party. Defendants had a right to this information to properly prepare for the suppression hearing, and the trial court erred in denying Defendants' Motion to Disclose the Confidential Informant's Identity.

POINT III

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT EITHER DEFENDANT "POSSESSED" THE DRUG PARAPHERNALIA "WITH INTENT TO USE"; DEFENDANTS' CONVICTIONS MUST THEREFORE BE OVERTURNED.

The statute under which the Defendants were convicted provides that it is "unlawful for any person to use, or to possess with intent to use, drug paraphernalia." Utah Code Ann. § 58-37a-5(1) (1981); *see also* Addendum 3. Given that the State presented no evidence that either Defendant actually used the drug paraphernalia, this statute requires the State to show two things: (1) possession or constructive possession of drug paraphernalia; and (2) an intention to use the drug paraphernalia. Defendants contend that the evidence on these two elements of the crime was so lacking that, even viewing the evidence in the light most favorable to

the verdict, "reasonable minds must have entertained a reasonable doubt that the Defendant[s] committed the crime of which they were convicted." *See State v. Cantu*, 750 P.2d 591, 593 (Utah 1988).

Because the Defendants did not have actual possession of the drug paraphernalia, the State may not rely on mere possession of the drug paraphernalia to prove Defendants' intent to use the same. *State v. Fox*, 709 P.2d 316, 318 (Utah 1985). The State must not only show that Defendants had constructive possession of the drug paraphernalia, but the State has the additional burden of proving that the Defendants intended to use the drug paraphernalia. Speaking about a controlled substance, the Utah Supreme Court in *Fox* explained the burden that the State must meet to prove constructive possession with an intent to use.

> [P]ersons who might know of the whereabouts of illicit drugs and who might even have access to them, but who have *no intent to obtain and use the drugs* cannot be convicted of possession of a controlled substance. *Knowledge and ability to possess do not equal possession where there is no evidence of intent to make use of that knowledge and ability.*
>
> To find that a defendant had constructive possession of a drug or other contraband, it is necessary to prove that there was a sufficient nexus between between the accused and the drug to permit an inference that the accused had *both* the power *and* the intent to exercise dominion and control over the drug. (Emphasis supplied, citations omitted).

Id. at 319.

The Court went on to say that whether the sufficient nexus spoken of exists depends upon the facts of each case. But it is clear that mere ownership and occupancy "are not alone sufficient to establish constructive possession, *especially*

when occupancy is not exclusive. " *Id.* (Emphasis supplied). In addition to showing ownership or occupancy, one or more of the following factors must be found: (1) incriminating statements of the accused; (2) incriminating behavior of the accused; (3) presence of the contraband, in this case the drug paraphernalia, "in a specific area over which the accused had control, such as a closet or drawer containing the accused's clothing or other personal effects;" and (4) "presence of drug paraphernalia among the accused's personal effects or in a place over which the accused has special control." *Id.*

All of the cases since *Fox* in which either this Court or the Utah Supreme Court found that a sufficient nexus exists between the defendant and the contraband, allowing the trier of fact to infer that the defendant intended to use the contraband, contain circumstances or facts falling into one of the four categories above. For example, in *State v. Hansen*, 732 P.2d 127 (Utah 1987), the Utah Supreme Court found that the defendant possessed marijuana with an intent to use because (1) the metal box containing the marijuana was stashed under the defendant's clothing next to his bed, (2) the metal box was locked with a key that was found in the Defendant's pants' pocket, (3) the defendant falsely denied possession of the key, and (4) the defendant also had drug scales on his book shelf. *Id.* at 132. Also, in *State v. Phelps*, 782 P.2d 196 (Utah App. 1989), this Court found that a sufficient nexus existed because (1) the defendant was the only occupant of the home, (2) the kitchen contained drug scales, and virtually each room of the home, including the closets, was equipped with sophisticated lighting, hydroponic growing systems, or otherwise used in the production of marijuana, and (3) "there was no evidence that anyone other than defendant then resided in, or had any access to, the interior of the home where all the marijuana production and processing was discovered." *Id.*

at 198. *See also State v. Watts*, 750 P.2d 1219, 1224 (Utah 1988).

In this case, the only evidence that the Defendants knew that the baseball cap contained drug paraphernalia, let alone that Defendants intended to use the same, was the fact that drug paraphernalia was found in a baseball cap hanging on the wall of what appeared to be the Defendants' master bedroom. The evidence clearly established that the officers conducting the search had no idea whether the baseball cap belonged to Mr. or Mrs. Deal or to their 17-year-old son. (R. at 66, p. at 35, 60). There was no evidence that the hat did not belong to others. There was no evidence that others did not have access to the room in which the hat was hanging. (R. at 66, p. at 59). The cap was not even taken in as evidence. (R. at 66, p at 35). Indeed, there were five or six baseball caps hanging next to the one containdrug paraphernalia (R. at 66, p. 60), and there was no evidence showing the juxtaposition of the hat containing the drug paraphernalia to other items belonging to the Defendants. (R. at 66, p. at 36). Moreover, the baseball cap was clearly a man's hat, not a woman's. (R. at 66, p. at 35). After reviewing the evidence, even the Court found that the baseball cap was located "in a common area," not a "specific area" over which the Defendants had control or among their "personal effects" or another area the Defendants' "special control." (R. at 66, p. at 64); *see also Fox*, 709 P.2d at 319. The trial court had no evidence of the Defendants' knowledge of the baseball cap and the drug paraphernalia other than this, and such evidence alone will not permit reasonable minds to conclude that the Defendants knew the whereabouts of the drug paraphernalia and had an intent to use them. *See Id.*

The trial court dismissed the possibility that the Defendants' son might have hidden the drug paraphernalia in the baseball cap because (1) the son would not have hidden the drugs in a place where the Defendants would have discovered them, such as Defendants' own room, and (2) there were pornographic pic-

tures in the room where the drug paraphernalia was found and it was, according to the trial court, unlikely that the son would frequent that area. (R. at 66, p. at 63). Yet, the son may have hidden the drug paraphernalia anywhere in the home, and the parents may have found it. The fact that the son hid the drug paraphernalia among the other baseball caps is simply more evidence that that area was a common area. Further, this situation does not present a catch 22 for the Defendants as the trial court suggests. (R. at 66, p. at 63). Even if the son hid the drug paraphernalia where the parents knew about them, that does not mean that the parents possessed the drug paraphernalia. The evidence of possession "must raise a reasonable inference that the defendant was engaged in a criminal enterprise *and not simply a bystander.*" *Id.* at 320. (Emphasis supplied). Mere knowledge is not enough to show possession.

Further, it is "sufficiently inconclusive," "inherently improbable," and highly speculative that the son did not hide the drug paraphernalia among the other baseball caps simply because there were pornographic pictures in the room. *See Cantu*, 750 P.2d at 593. This is especially so since there was no evidence showing the juxtaposition of the baseball caps to the pornographic pictures.
(R. at 66, p. at 36).

Finally, there was no evidence of incriminating statements or incriminating behavior of either of the Defendants before, during, or after the search. The only evidence before the trial court of what happened during the search is that after the police entered the home, Defendant James Deal exited the room containing the baseball cap, (R. 66, p. 32), and that the Defendants refused to talk to the police officers during and after the search. (R. 66, p. 57).

This case is unlike *Hansen*, unlike *Phelps*, and unlike *Watts*. Even viewing

the evidence in the light most favorable to the verdict, it is clear that reasonable minds must have entertained a reasonable doubt that the Defendants committed the crime of which they were convicted. *See Cantu*, 750 P.2d at 593.

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court to find that the trial court erred in failing to grant Defendants' Motion to Suppress, that the trial court erred in failing to grant Defendants' Motion to Disclose the Confidential Informant's Identity, and that the trial court erred in finding that Defendants possessed the drug paraphernalia with the intent to use the same. Accordingly, Defendants ask this Court to reverse their convictions.

RESPECTFULLY SUBMITTED, this 5th day of November, 1990.

SNOW & JENSEN

/S/
V. Lowry Snow

/S/
Lewis P. Reece
Attorneys for Appellants

CERTIFICATE OF DELIVERY

This is to certify that I caused ~~four~~ one true and exact copies of the within and foregoing BRIEF FOR APPELLANTS to be delivered on the 5th day of November, 1990, to the following:

Paul F. Graf & O. Brenton Rowe
Washington County Attorney's Office
178 North 200 East
St. George, Utah

/S/
Secretary

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENTS I-X [BILL OF RIGHTS]
AMENDMENTS XI-XXVI

AMENDMENT I

[Religious and political freedom.]
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

[Right to bear arms.]
A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

[Quartering soldiers.]
No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

[Unreasonable searches and seizures.]
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII

[Trial by jury in civil cases.]
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

[Bail — Punishment.]
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

[Rights retained by people.]
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

[Powers reserved to states or people.]
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

[Suits against states — Restriction of judicial power.]
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

[Election of President and Vice-President.]
The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate;—The *President of the Senate shall, in the presence of the* Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three

(a) persons charged with a capital offense when there is substantial evidence to support the charge or

(b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge, or

(c) persons charged with a crime, as defined by statute, when there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to self or any other person or to the community or is likely to flee the jurisdiction of the court if released on bail

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law 1989

Sec. 9. [Excessive bail and fines — Cruel punishments.]

Excessive bail shall not be required excessive fines shall not be imposed nor shall cruel and unusual punishments be inflicted Persons arrested or imprisoned shall not be treated with unnecessary rigor 1896

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate In courts of general jurisdiction except in capital cases a jury shall consist of eight jurors In courts of inferior jurisdiction a jury shall consist of four jurors In criminal cases the verdict shall be unanimous In civil cases three-fourths of the jurors may find a verdict A jury in civil cases shall be waived unless demanded 1896

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person for an injury done to him in his person, property or reputation, shall have remedy by due course of law which shall be administered without denial or unnecessary delay, and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party 1896

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof to testify in his own behalf to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed and the right to appeal in all cases In no instance shall any accused person, before final judgment be compelled to advance money or fees to secure the rights herein guaranteed The accused shall not be compelled to give evidence against himself, a wife shall not be compelled to testify against her husband nor a husband against his wife nor shall any person be twice put in jeopardy for the same offense 1896

Sec. 13 [Prosecution by information or indictment — Grand jury.]

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature 1949

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation particularly describing the place to be searched, and the person or thing to be seized 1896

Sec. 15. [Freedom of speech and of the press — Libel.]

No law shall be passed to abridge or restrain the freedom of speech or of the press In all criminal prosecutions for libel the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted and the jury shall have the right to determine the law and the fact 1896

Sec. 16. [No imprisonment for debt — Exception.]

There shall be no imprisonment for debt except in cases of absconding debtors 1896

Sec. 17. [Elections to be free — Soldiers voting.]

All elections shall be free and no power civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage Soldiers, in time of war, may vote at their post of duty in or out of the State, under regulations to be prescribed by law 1896

Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed 1896

Sec. 19. [Treason defined — Proof.]

Treason against the State shall consist only in levying war against it, or in adhering to its enemies or in giving them aid and comfort No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act 1896

Sec. 20. [Military subordinate to the civil power.]

The military shall be in strict subordination to the civil power, and no soldier in time of peace, shall be quartered in any house without the consent of the owner, nor in time of war except in a manner to be prescribed by law 1896

Sec. 21. [Slavery forbidden.]

Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted shall exist within this State 1896

Sec. 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation 1896

Sec. 23. [Irrevocable franchises forbidden.]

No law shall be passed granting irrevocably any franchise, privilege or immunity 1896

"Drug paraphernalia" means any equipment, product, or material used, or intended for use, to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, conceal, inject, ingest, inhale, or to otherwise introduce a controlled substance into the human body in violation of Chapter 37, Title 58, and includes, but is not limited to:

(1) Kits used, or intended for use, in planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) Kits used, or intended for use, in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance;

(3) Isomerization devices used, or intended for use, to increase the potency of any species of plant which is a controlled substance;

(4) Testing equipment used, or intended for use, to identify or to analyze the strength, effectiveness, or purity of a controlled substance;

(5) Scales and balances used, or intended for use, in weighing or measuring a controlled substance;

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannited, dextrose and lactose, used, or intended for use to cut a controlled substance;

(7) Separation gins and sifters used, or intended for use to remove twigs, seeds, or other impurities from marihuana;

(8) Blenders, bowls, containers, spoons and mixing devices used, or intended for use to compound a controlled substance;

(9) Capsules, balloons, envelopes, and other containers used, or intended for use to package small quantities of a controlled substance;

(10) Containers and other objects used, or intended for use to store or conceal a controlled substance;

(11) Hypodermic syringes, needles, and other objects used, or intended for use to parenterally inject a controlled substance into the human body; and

(12) Objects used, or intended for use to ingest, inhale, or otherwise introduce marihuana, cocaine, hashish, or hashish oil into the human body, including but not limited to:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs; and

(m) Ice pipes or chillers. 1981

58-37a-4. Considerations in determining whether object is drug paraphernalia.

In determining whether an object is drug paraphernalia, the trier of fact, in addition to all other logically relevant factors, should consider:

(1) statements by an owner or by anyone in control of the object concerning its use;

(2) prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to a controlled substance;

(3) the proximity of the object, in time and space, to a direct violation of this chapter;

(4) the proximity of the object to a controlled substance;

(5) the existence of any residue of a controlled substance on the object;

(6) instructions whether oral or written, provided with the object concerning its use;

(7) descriptive materials accompanying the object which explain or depict its use;

(8) national and local advertising concerning its use;

(9) the manner in which the object is displayed for sale;

(10) whether the owner or anyone in control of the object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(11) direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(12) the existence and scope of legitimate uses of the object in the community; and

(13) expert testimony concerning its use. 1981

58-37a-5. Unlawful acts.

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act. Any person who violates this subsection is guilty of a class A misdemeanor.

(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a class B misdemeanor. 1981